



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS-2023-0005]

RIN 0750-AK35

Defense Federal Acquisition Regulation Supplement: Export-Controlled Items (DFARS Case 2018-D053)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a requirement for certain contractors to provide export authorizations.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018-D053, using either of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2018-D053." Select "Comment" and follow the instructions to submit a comment. Please include "DFARS Case 2018-D053" on any attached documents.
- *Email:* osd.dfars@mail.mil. Include DFARS Case 2018-D053 in

the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Kimberly Bass, telephone 703-717-3446.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to enable the Defense Contract Management Agency (DCMA) to obtain export authorizations from certain contractors. Specifically, when a contract requires government quality assurance surveillance oversight and has delivery to, or production or performance in, government quality assurance countries, DoD proposes to require the contractor to provide relevant export authorizations (i.e., export license exemptions, export license exceptions, export licenses, or other approvals) to the cognizant DCMA administrative contracting officer along with contact information for the empowered official or the export point of contact. Government quality assurance countries include the following countries: Australia, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Israel, Italy, Republic of Korea, Netherlands, Norway, Poland, Romania, Slovakia, Spain, Sweden, Turkey, and the United Kingdom.

DCMA has found that a significant amount of time is required to determine whether or not a contractor's export license allows for foreign auditors to perform required quality assurance functions in lieu of DCMA. Currently, DCMA is not able to review the export authorization unless their personnel travel to the contractor's worksite. If DCMA is able to receive and review an export authorization from the contractor to determine whether or not they can delegate the work to foreign auditors, this problem would be resolved.

II. Discussion and Analysis

The proposed rule updates DFARS clause 252.225-7048, Export-Controlled Items, by adding to the clause at paragraph (e) a requirement for certain contractors to provide relevant export authorizations to the cognizant DCMA administrative contracting officer along with contact information for the empowered official or the export point of contact. A contractor will be required to submit this information if their contract requires-

- (1) Performance in or delivery to a government quality assurance country; and
- (2) Government quality assurance surveillance oversight.

The proposed rule revises the term export-controlled items and adds the following terms to the list of definitions at 252.225-7048: Empowered official, export license exception, export license exemption, government quality assurance countries, other approval, and relevant export authorization. The purpose of adding these definitions to the clause is to clarify for

contractors the requirement that is proposed to be added at 252.225-7048(e) .

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold, for Commercial Products Including Commercially Available Off-the-Shelf Items, and for Commercial Services

The proposed rule applies to contracts at or below the simplified acquisition threshold, for commercial products including commercially available off-the-shelf items, and for commercial services. This proposed rule requires relevant export authorizations and the contact information of the export point of contact or the empowered official be provided to DCMA for DoD contracts that require government quality assurance surveillance oversight and have delivery to, or performance in, government quality assurance countries. Therefore, the proposed rule will apply to contracts at or below the simplified acquisition threshold, for commercial products including commercially available off-the-shelf items, and for commercial services.

IV. Expected Impact of the Proposed Rule

Currently, DCMA is required to cite Federal Acquisition Regulation 4.703(a) in order to obtain access to a contractor's export authorization, which only requires the contractor to make the information available to DCMA, not to submit the information directly to DCMA. Therefore, DCMA personnel are not able to review the information unless they travel to the contractor's

international worksite to inspect the export authorization in person.

This proposed rule would require the contractor to provide the information to DCMA and identify a point of contact to answer questions. Receiving the information directly will allow DCMA, without traveling internationally, to make an informed determination regarding whether quality assurance activities must be performed by a U.S. contract administrator or may be delegated to a qualified foreign inspector.

Contractors would already have the export authorization. Therefore, the only burden associated with this proposed rule is providing a copy to the DCMA administrative contracting officer. DoD has calculated this burden in section VIII of this preamble.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule is required to enable DCMA to obtain export authorizations from certain contractors. Currently, DCMA is not able to review the information unless their personnel travel to the contractor's worksite. Until DCMA determines if export control items are present and the licenses are examined, DCMA is unable to exercise Host Nation Agreements. Requiring the export control license will allow DCMA to make the determination necessary to exercise Host Nation Agreements.

The objective of this proposed rule is to require certain contractors and subcontractors to provide, upon receipt, relevant export authorizations (i.e., export license exemptions, export license exceptions, export licenses, or other approvals) to the cognizant DCMA administrative contracting officer along with contact information for the empowered official or the export point of contact. The legal basis for the proposed rule is 41 U.S.C. 1303.

Based on the extrapolation from the DCMA Compass database, it is estimated that 723 small entities were awarded DoD contracts that require government quality assurance oversight surveillance and have delivery to, or performance in, government quality

assurance countries from May 2018 through May 2019. It is estimated that most of these small entities have subcontracts with delivery to, or performance in, government quality assurance countries. The government quality assurance countries are as follows: Australia, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Israel, Italy, Republic of Korea, Netherlands, Norway, Poland, Romania, Slovakia, Spain, Sweden, Turkey, and the United Kingdom. Any additional burden from having to submit relevant export authorizations along with contact information for the empowered official or the export point of contact to DCMA will impact these small entities.

There are reporting, recordkeeping, or other compliance requirements associated with this proposed rule. The proposed rule may result in a reporting or recordkeeping burden requirement.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

DoD invites comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this proposed rule in accordance with 5 U.S.C. 610. Interested parties must

submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2018-D053), in correspondence.

VII. Paperwork Reduction Act

This proposed rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). Accordingly, DoD has submitted a request for approval of a new information collection requirement concerning 2018-D053, Export-Controlled Items, to the Office of Management and Budget.

A. Estimate of Public Burden

Public reporting burden for this collection of information is estimated to average 4 hours per response for: (1) the contractor to locate the contact information for the cognizant DCMA Office using the DCMA locator website; (2) the contractor to provide relevant export authorizations and contact information for the empowered official or export point of contact to DCMA; and (3) if necessary, for the empowered official to provide clarifications to DCMA.

The annual reporting burden is estimated as follows for all contractors with awards that require government quality assurance surveillance oversight and have delivery to, or production or performance in, government quality assurance countries:

Respondents: 3,614

Responses per respondent: 1

Total annual responses: 3,614

Preparation hours per response: 4 hours

Total response Burden Hours: 14,456

B. Request for Comments Regarding Paperwork Burden

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be submitted using the Federal eRulemaking Portal at <https://www.regulations.gov>. Search for "DFARS Case 2018-D053." Select "Comment" and follow the instructions to submit a comment. Please include "Paperwork Burden - DFARS Case 2018-D053" on any attached documents. Comments must be submitted by the date for submission of public comments shown in the **DATES** section of this preamble.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To obtain a copy of the supporting statement and associated collection instruments, please email *osd.dfars@mail.mil*. Include DFARS Case 2018-D053 in the subject line of the message.

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

2. Amend section 212.301 by—
- a. Redesignating paragraphs (f)(ix)(CC) through (MM) as (f)(ix)(DD) through (NN); and
 - b. Adding a new paragraph (f)(ix)(CC).

The addition reads as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

* * * * *

(f) * * *

(ix) * * *

(CC) Use the clause at 252.225-7048, Export-Controlled Items, as prescribed in 225.7901-4, to comply with section

890(a) of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

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PART 225—FOREIGN ACQUISITION

3. Revise section 225.7901-1 to read as follows:

225.7901-1 Definitions.

As used in this section—

Export-controlled items means—

(1) Any information or material that cannot be released to foreign nationals or representatives of a foreign entity, without first obtaining approval or license from the Department of State or the Department of Commerce;

(2) Items subject to the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130) or the Export Administration Regulations (EAR) (15 CFR parts 730 through 774); and

(3) Includes—

(i) “Defense article” (22 CFR 120.31), which means any item or technical data that is specifically designed, developed, configured, adapted, or modified for a military or other controlled use listed on the U.S. Munitions List;

(ii) “Defense service” (22 CFR 120.32), which means providing technical data, assistance, or training to a foreign person in the design, manufacture, installation, repair, or operation of a defense article;

(iii) "Technical data" (22 CFR 120.33), which means any information for the design, development, assembly, production, operation, repair, testing, maintenance, or modification of a defense article; and

(iv) "Item," defined in the EAR (15 CFR 772.1) as "commodities, software, and technology".

225.7901-2 [Amended]

4. Amend section 225.7901-2 by removing "International Traffic in Arms Regulations" and "Export Administration Regulations" and adding "ITAR" and "EAR" in their places, respectively.

5. Revise section 225.7901-4 to read as follows:

225.7901-4 Contract clause.

Use the clause at 252.225-7048, Export-Controlled Items, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services.

225.7902-2 [Amended]

6. Amend section 225.7902-2 by removing "International Traffic in Arms Regulation (ITAR)" and adding "ITAR" in its place.

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 252.225-7048-

- a. In the clause heading, by removing the date "(JUN 2013)" and adding "(DATE)" in its place;
- b. By revising paragraph (a);

- c. In paragraphs (d)(4) and (5), by removing "Parts" and adding "parts" in its place;
- d. By redesignating paragraph (e) as paragraph (f);
- e. By adding a new paragraph (e); and
- f. By revising the newly redesignated paragraph (f).

The revisions and addition read as follows.

252.225-7048 Export-Controlled Items.

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(a) *Definitions.* As used in this clause—

Empowered official, as defined in the International Traffic in Arms Regulations (ITAR) at 22 CFR 120.67, means—

(1) A U.S. person who—

(i) Is directly employed by the applicant or a subsidiary in a position having authority for policy or management within the applicant organization;

(ii) Is legally empowered in writing by the applicant to sign license applications or other requests for approval on behalf of the applicant;

(iii) Understands the provisions and requirements of the various export control statutes and regulations, and the criminal liability, civil liability, and administrative penalties for violating the Arms Export Control Act and the ITAR; and

(iv) Has the independent authority to—

(A) Inquire into any aspect of a proposed export, temporary import, or brokering activity by the applicant;

(B) Verify the legality of the transaction and the accuracy of the information to be submitted; and

(C) Refuse to sign any license application or other request for approval without prejudice or other adverse recourse.

(2) For the purposes of a broker who is a foreign person, the empowered official may be a foreign person who otherwise meets the criteria for an empowered official in paragraph (1) of this definition.

Export-controlled items means—

(1) Any information or material that cannot be released to foreign nationals or representatives of a foreign entity, without first obtaining approval or license from the Department of State or the Department of Commerce;

(2) Items subject to the ITAR (22 CFR parts 120 through 130) or the Export Administration Regulations (EAR) (15 CFR parts 730 through 774); and

(3) Includes—

(i) “Defense article” (22 CFR 120.31), which means any item or technical data that is specifically designed, developed, configured, adapted, or modified for a military or other controlled use listed on the U.S. Munitions List;

(ii) “Defense service” (22 CFR 120.32), which means providing technical data, assistance, or training to a foreign person in the design, manufacture, installation, repair, or operation of a defense article;

(iii) "Technical data" (22 CFR 120.33), which means any information for the design, development, assembly, production, operation, repair, testing, maintenance, or modification of a defense article; and

(iv) "Item," defined in the EAR (15 CFR 772.1) as "commodities, software, and technology".

Export license exception means a special authorization that allows export or re-export, under stated conditions, of items that are subject to the EAR that would otherwise require an export license. Export license exceptions are detailed in the EAR, 15 CFR 740.

Export license exemption means the authorization that exempts the item or items from the otherwise applicable licensing requirements under certain conditions. Export license exemptions are detailed in the ITAR, 22 CFR parts 120 through 130.

Government quality assurance countries means countries that have current Government Reciprocal Quality Assurance agreements with the Department of Defense or Reciprocal Government Quality Assurance annexes contained in a Reciprocal Defense Procurement Memorandum of Understanding. Accordingly, the following are government quality assurance countries: Australia, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Israel, Italy, Republic of Korea, Netherlands, Norway, Poland, Romania, Slovakia, Spain, Sweden, Turkey, and the United Kingdom.

"Other approval" as defined in the ITAR at 22 CFR 120.57, means a document issued by the Deputy Assistant Secretary of State for

Defense Trade Controls, or authorized designee, that approves an activity regulated by the ITAR (e.g., approvals for brokering activities or retransfer authorizations), or the use of an exemption to the license requirements as described in the ITAR.

Relevant export authorization means an export license exemption, export license exception, export license, or other approval.

* * * * *

(e)(1) If the contract requires government quality assurance surveillance oversight and has delivery to, or production or performance in, government quality assurance countries, the Contractor shall, upon receipt of relevant export authorizations, provide to the Defense Contract Management Agency (DCMA) Administrative Contracting Officer—

(i) A copy of the relevant export authorizations; and

(ii) Contact information for the empowered official or the export point of contact.

(2) The DCMA administrative contracting officer locator can be found at https://pubmini.dcma.mil/CMT_View/CMT_View_Search.cfm.

(f) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts.

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